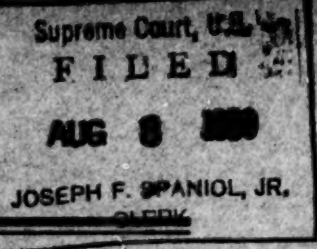


No. 89-2005

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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOYCE CARLE, PETITIONER

v.

L.F. WOODS, POSTMASTER

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's failure either to name the proper defendant under 42 U.S.C. 2000e-16(c), or to provide sufficient notice to the proper defendant for purposes of "relation back" under Fed. R. Civ. P. 15(c), warranted dismissal of her complaint alleging discrimination in employment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Brown v. GSA</i> , 425 U.S. 820 (1976)	5
<i>Hancock v. Egger</i> , 848 F.2d 87 (6th Cir. 1988)	5
<i>Honeycutt v. Long</i> , 861 F.2d 1346 (5th Cir. 1988)	5
<i>Irwin v. Veterans Administration</i> , cert. granted, 110 S. Ct. 1109 (1990)	8
<i>Johnson v. United States Postal Service</i> , 861 F.2d 1475 (10th Cir. 1988)	7, 8
<i>Lehman v. Nakshian</i> , 453 U.S. 156 (1981)	5
<i>Martinez v. Orr</i> , 738 F.2d 1107 (10th Cir. 1984)	8
<i>Schiavone v. Fortune</i> , 477 U.S. 21 (1986)	3, 6, 7

Statute and rules:

42 U.S.C. 2000e-16(c)	2, 3, 4, 7, 8
Fed. R. Civ. P.:	
Rule 4(j)	7
Rule 15(c)	3, 4, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B13) and the order of the district court (Pet. App. A1-A22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1990. A petition for rehearing was denied on May 14, 1990. The petition for a writ of certiorari was filed on June 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a clerk-stenographer in the Norman, Oklahoma, post office. In an administrative complaint

brought pursuant to the applicable procedures of the U.S. Postal Service, she alleged that on August 28, 1984, she was denied use of a door providing access to an adjacent office and threatened with disciplinary action regarding the quality of her work. She claimed that these actions were the result of sex discrimination, or of reprisal for a previous complaint she had filed with the Equal Employment Opportunity Commission. After conducting a hearing, the Postal Service found that petitioner's complaints were unfounded. Petitioner filed a timely appeal with the EEOC, which affirmed the agency's decision on August 17, 1987. Pet. App. B2-B3. Petitioner received notice of this action on August 18, 1987. Pet. App. A2 n. 1; *id.* at B5 n. 2; Pet. 5-6.¹

On September 14, 1987, petitioner filed a civil suit pursuant to 42 U.S.C. 2000e-16(c) (Title VII) naming as defendant only respondent Leslie F. Woods, the Postmaster of the United States Post Office at Norman, Oklahoma. Respondent received a summons on September 16, 1987, without a complaint attached. Pet. App. A3; *id.* at B5. The United States Attorney was not served until September 22, 1987. Pet. 6.² Postmaster General Preston R. Tisch, the only

¹ The notice specifically informed petitioner (Pet. App. A7-A8): if you file a civil action, *YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT.* * * * Failure to provide the *NAME OR OFFICIAL TITLE* of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: for this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education, and Welfare, *not* the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

² Both courts below found that service on the U. S. Attorney was not effected until October 2, 1987. Pet. App. A4; *id.* at B6. The docket sheet indicates that service of a summons on the U.S. Attorney was

proper defendant under 42 U.S.C. 2000e-16(c), was served on September 28, 1987. Pet. App. A3-A4; *id.* at B5-B6.³

2. Respondent filed a motion to dismiss on the ground that petitioner had failed to comply with the jurisdictional requirements of Section 2000e-16(c): although her suit was filed within 30 days of receipt of notice of the final agency action on her administrative complaint, she had not named the proper defendant, nor provided actual or constructive notice to him within that period. The district court granted the motion, explaining that the Postmaster General, as head of the U.S. Postal Service, was the only proper defendant in petitioner's Title VII suit, but that petitioner had instead named as defendant only respondent, the local Norman, Oklahoma, postmaster. Pet. App. A4-A8. The court recognized that an amended complaint naming the proper defendant could "relate back" to the date of the original complaint under Fed. R. Civ. P. 15(c). But in light of *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986), the court concluded that there could be no relation back here, because there was no service of the complaint on the U.S. Attorney or the Postmaster General within the 30-day period established by Section 2000e-16(c). Pet. App. A9-A13.

Observing that the Tenth Circuit has held that the time limits of Title VII are subject to equitable tolling (Pet.

first executed on September 22, 1987. Case No. CIV-87-1871 W, United States District Court for the Western District of Oklahoma, Document No. 5. The docket sheet also indicates that the U.S. Attorney was subsequently served by certified mail on October 2, 1987 (Doc. No. 9), and by personal service on October 13, 1987 (Doc. No. 12).

³ It is not clear whether petitioner ever sought to amend her complaint to identify the Postmaster General as the defendant. Compare Docket No. 21 (referring to "Mtns to join addl prtys") with Gov't C.A. Br. 4 ("The record does not reflect that [petitioner] ever requested leave to amend her complaint to add the Postmaster General."). The petition, which identifies L. F. Woods as the sole respondent, does not allege that such an amendment was sought.

App. A19), the district court found that the facts of this case did not warrant that relief. "Far from being misled or lulled into inaction, [petitioner] herein previously received specific notice by court order discussing Title VII requirements concerning the failure to name the proper party within the thirty-day limitations period."⁴ Moreover, the notice of final agency action received by petitioner "clearly stated in plain language that the local department was not the proper party in a discrimination claim, and that failure to sue the head of the national agency by name or official title could result in loss of judicial redress." *Id.* at A20-A21.⁵

3. The court of appeals affirmed. It agreed that petitioner had failed to identify the proper statutory defendant in her complaint, or to satisfy the requirements for relation back under Rule 15(c) by giving actual or constructive notice to that defendant within 30 days of notice of final agency action, as required by Section 2000e-16(c). Pet. App. B5-B12. The court of appeals also affirmed the district court's conclusion that there was no equitable basis in this case for tolling the statutory period. It explained that "instead of being misled or deceived or lulled into inaction, [petitioner] was specifically instructed on the party and timing requirements of § 2000e-16(c) through the EEOC's

⁴ The court explained (Pet. App. A6-A7) that an earlier discrimination suit brought by petitioner (No. Civ-86-1297-W (W.D. Okla. Dec. 13, 1986)) was dismissed for failure to name the proper defendant within the statutory period—the same flaw that led to dismissal in this case.

⁵ The court also noted "for purposes of equitable considerations" that the earlier suit (see note 4, *supra*) had also involved restrictions on petitioner's access to the adjacent office, so that the incident triggering the instant lawsuit appeared to be "an integral part of the previous lawsuit." Pet. App. A21-A22.

'Notice of Right to File a Civil Action' attached to the EEOC decision." Pet. App. B12-B13.

ARGUMENT

1. The United States, as sovereign, is immune from suit save as it consents to be sued, and such waivers of sovereign immunity are to be strictly construed. *Lehman v. Nakshian*, 453 U.S. 156, 160-161 (1981). By providing remedies against the government for violations of Title VII, Congress has provided the necessary consent (*Brown v. GSA*, 425 U.S. 820, 833 (1976)), but the terms of that consent strictly confine the court's jurisdiction to entertain the suit. *Lehman*, 453 U.S. at 160. For these reasons, the timely filing of a civil action that satisfies the requirements of Section 2000e-16(c), including the naming of the proper defendant, is a jurisdictional prerequisite to district court consideration of a government employee's Title VII complaint. *Hancock v. Egger*, 848 F.2d 87 (6th Cir. 1988); *Honeycutt v. Long*, 861 F.2d 1346, 1350-1351 (5th Cir. 1988).

Although petitioner's complaint was timely filed, it failed to name the proper defendant. Section 2000e-16(c) expressly requires that in the civil action authorized by that Section, "the head of the department, agency or unit, as appropriate, shall be the defendant." This requirement was highlighted in the notice of the right to sue received by petitioner (see note 1, *supra*), which emphasized that "if you file a civil action, **YOU MUST NAME THE APPROPRIATE OFFICIAL AGENCY OR DEPARTMENT HEAD AS THE DEFENDANT.** * * * Failure to provide the **NAME OR OFFICIAL TITLE** of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled." Pet. App. A7.⁶

⁶ The Notice further explained (Pet. App. A7): "[f]or this purpose, Department means the overall national organization, such as the now

Despite this clear warning, petitioner named as defendant only respondent, her local postmaster; she did not name the Postmaster General in her timely filed complaint.

As both the district court and the court of appeals properly held, petitioner is not entitled to cure this defect in her complaint by amending the complaint and invoking the "relation back" provisions of Fed. R. Civ. P. 15(c). Under Rule 15(c), an amended complaint changing a party against whom a claim is asserted relates back to the date the original complaint was filed only if a plaintiff has given adequate notice to the proper defendant within the applicable time period. *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986). Petitioner has failed to satisfy that requirement. Since petitioner received the final EEOC decision denying her claim of discrimination on August 18, 1987, her time to perfect her claim for judicial relief by giving actual or constructive notice to the proper defendant expired on September 17, 1987. Petitioner's complaint was not served on the U.S. Attorney until September 22, 1987,⁷ and the Postmaster General was not served until September 28, 1987.

defunct Department of Health, Education, and Welfare, *not* the local administrative department where you work."

⁷ Service on the United States Attorney is sufficient to provide constructive notice to the Postmaster General. Fed. R. Civ. P. 15(c).

A summons with no complaint attached was served on respondent, the local postmaster, on September 16, 1987. Pet. App. A3 n. 2. Because the bare summons did not indicate the kind of action that was being taken against him, the district court concluded that respondent had received insufficient notice within the limitations period to impute notice to the Postmaster General, even assuming (which the district court doubted, *id.* at A16-A19) that adequate notice to respondent would constitute constructive notice to the Postmaster General. *Id.* at A13-A16. Cf. *Schiavone*, 477 U.S. at 29. The court of appeals agreed that, without a copy of the complaint, respondent did not have suffi-

Although petitioner recognizes that the U.S. Attorney was not served until September 22, 1987 (Pet. 6), she nevertheless contends that this was timely, apparently relying on an asserted "admission * * * that the United States Attorney had notice of the action within the limitations period." Pet. 12.⁸ There has been no such admission. Petitioner cites (Pet. 11-12) only a statement in the government's brief in support of its motion to dismiss (at 11 n.6) indicating that "personal service was made on the United States Attorney in Oklahoma City, but to our knowledge no copy of the Complaint and Summons was mailed to the Attorney General in Washington." In context, however, this statement cannot be construed as an admission—contrary to the facts that petitioner herself recognizes (Pet. 6)—that the U.S. Attorney was *timely* served with a summons and complaint. Instead, the text that the cited footnote explicates specifically explains that service on the U.S. Attorney was *not* timely (Br. in Support of Defendant's Mot. to Dismiss 11):

the last date on which [petitioner] could timely file this suit was September 17, 1987. The only proper service

cient notice of the substance of the civil action to constitute constructive notice to the Postmaster General. Pet. App. B10-B11.

⁸ Alternatively, petitioner may be contending that, since the original complaint was timely filed under 42 U.S.C. 2000e-16(c), and was served on the U.S. Attorney within the 120 days required by Fed. R. Civ. P. 4(j), the service was also "timely" for purposes of relation back under Rule 15(c). Such a contention would, of course, be flatly inconsistent with *Schiavone*, 477 U.S. at 30 (refusing to "temper the plain meaning of the language [of Rule 15(c)] by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint"). See *Johnson v. United States Postal Service*, 861 F.2d 1475, 1479-1480 (10th Cir. 1988).

made in this case was on the United States Attorney's office in Oklahoma City, Oklahoma on September 22, 1987. Thus it is clear that the proper party defendant, Preston R. Tisch [the Postmaster General] was not put on notice of the pendency of this suit prior to the expiration of the 30-day period within which such suit had to be filed under 42 U.S.C. § 2000e-16(c).

2. The courts of appeals are divided over the question whether the requirement of 42 U.S.C. 2000e-16(c) that discrimination complaints against the federal government be filed within thirty days of receipt of notice of final administrative action is a statute of limitations that is subject to equitable tolling, or a jurisdictional requirement that cannot be waived or enlarged on the basis of equitable considerations. That question is presented in *Irwin v. Veterans Administration*, cert. granted, 110 S. Ct. 1109 (1990). Petitioner does not suggest that this case should be held pending the decision in *Irwin*, and there is no need for the Court to do so. Petitioner has already received the benefit of the more liberal rule, since the Tenth Circuit is of the view that the 30-day period is not jurisdictional. *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984); *Johnson v. U.S. Postal Service*, 861 F.2d 1475, 1480 (10th Cir. 1988); see Pet. App. A19. Accordingly, both courts below specifically considered whether equitable tolling would be appropriate in petitioner's circumstances, and concluded that it would not. Pet. App. A19-A22; *id.* at B12-B13. Petitioner—who has previously failed to name the proper defendant under Section 2000e-16(c), see notes 4, 5, *supra*—does not question that conclusion in this Court. Therefore, whatever the outcome in *Irwin*, this Court's decision will not implicate the validity of the result below.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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